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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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H.A. FOLSOM & ASSOCIATES, INC., a  
Utah corporation d/b/a Folsom Associates,

Plaintiff,

v.

MICHAEL CAPEL, an individual,

Defendant.

**MEMORANDUM DECISION AND  
ORDER GRANTING [37] PLAINTIFF'S  
MOTION FOR VOLUNTARY  
DISMISSAL WITHOUT PREJUDICE**

Case No. 2:16-CV-00160-DN

District Judge David Nuffer

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Plaintiff H.A. Folsom & Associates, Inc. (“Folsom”) moved<sup>1</sup> for the voluntary dismissal of his Complaint<sup>2</sup> under [Fed. R. Civ. P. 41\(a\)\(2\)](#). At the time the motion was filed, Defendant Michael Capel (“Mr. Capel”) had already served his Answer to the Complaint.<sup>3</sup> Folsom argues that granting the dismissal is appropriate because “Mr. Capel would not be prejudiced in any way”<sup>4</sup> by the dismissal.

Mr. Capel responded by filing a “conditional notice of non-opposition” to the Motion.<sup>5</sup> Mr. Capel took issue with the request for dismissal due to the “significant amount of time and effort” that have been expended to date in the case.<sup>6</sup> Mr. Capel then requested that the dismissal

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<sup>1</sup> Motion for Voluntary Dismissal Without Prejudice (“Motion”), [docket no. 37](#), filed June 16, 2017.

<sup>2</sup> Amended Complaint (“Complaint”), [docket no. 30](#), filed February 23, 2017.

<sup>3</sup> Answer and Defenses of Michael Capel to Amended Complaint, [docket no. 34](#), filed March 9, 2017.

<sup>4</sup> Motion at 1.

<sup>5</sup> Defendant Michael Capel’s Response and Conditional Notice of Non-Opposition to Plaintiff’s Motion for Voluntary Dismissal Without Prejudice (“Response”), [docket no. 39](#), filed June 21, 2017.

<sup>6</sup> Response at 5.

be conditioned upon Folsom paying for Mr. Capel’s legal fees and costs to date.<sup>7</sup> Mr. Folsom replied<sup>8</sup> arguing that the circumstances here do not warrant the payment of Mr. Capel’s fees.<sup>9</sup>

“Absent ‘legal prejudice’ to the defendant, the district court normally should grant” a plaintiff’s request for voluntary dismissal after a defendant has answered the complaint.<sup>10</sup> “The parameters of what constitutes “legal prejudice” are not entirely clear” but a district court “should endeavor to insure substantial justice is accorded to both parties.”<sup>11</sup>

In circumstances where a plaintiff voluntary dismisses an action in federal court and intends to refile in another forum, another federal circuit has held that “there is no basis” to conclude “that the defendant will be prejudiced” by declining to condition voluntary dismissal on the payment of attorney fees and costs.<sup>12</sup> This is especially true “when federal discovery will be useable” in the other forum.<sup>13</sup>

The circumstances are similar here: Folsom intends to refile the action in another forum.<sup>14</sup> The work performed to date in the present action will be useable in any subsequent filing. Declining to condition Folsom’s voluntary dismissal on an award of fees and costs to Mr. Capel does not constitute legal prejudice to Mr. Capel. The Motion will be GRANTED and the case will be dismissed without prejudice.

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<sup>7</sup> *Id.*

<sup>8</sup> Reply in Support of Motion for Voluntary Dismissal Without Prejudice (“Reply”), [docket no. 40](#), filed June 23, 2017.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997).

<sup>11</sup> *Id.*

<sup>12</sup> *Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir. 1987).

<sup>13</sup> *Id.*

<sup>14</sup> Motion at 2; Response at 5 (Mr. Capel identifies that Folsom intends to refile in Colorado).

## ORDER

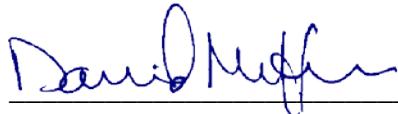
IT IS HEREBY ORDERED THAT the Motion<sup>15</sup> is GRANTED, unconditionally.

Defendant's request that this order be accompanied by an award of fees and costs<sup>16</sup> is DENIED.

This case is DISMISSED, without prejudice. The clerk is directed to close the case.

Signed March 29, 2018.

BY THE COURT



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David Nuffer  
United States District Judge

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<sup>15</sup> Motion for Voluntary Dismissal Without Prejudice (“Motion”), [docket no. 37](#), filed June 16, 2017.

<sup>16</sup> Defendant Michael Capel’s Response and Conditional Notice of Non-Opposition to Plaintiff’s Motion for Voluntary Dismissal Without Prejudice at 3, [docket no. 39](#), filed June 21, 2017.